COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS. SUPERIOR COURT
CIVIL ACTION
NO. 2012-00638

DAVID LEW, ADMINISTRATOR
OF THE ESTATE OF JASON LEW,
Plaintiff,
V.
MEREDITH GILSON, M.D.,
DENISE DALLACOSTA, R.N., AND
PMG PHYSICIAN ASSOCIATES, P.C.,
Defendants.

PLAINTIFF'S MOTION *IN LIMINE* TO EXCLUDE AND REDACT "MANNER OF DEATH" STATEMENTS FROM THE DECEDENT'S DEATH CERTIFICATE, AUTOPSY REPORT AND NOTICE OF DEATH, AND TO PRECLUDE ANY MENTION THAT MR. LEW'S DEATH WAS DEEMED A "HOMICIDE"

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NOW COMES the plaintiff and hereby moves *in limine*, pursuant to Mass. Gen. L. c. 46, § 19, that this Honorable Court redact portions of documents commenting on the manner of Mr. Lew's death, specifically that is was a homicide and/or the result of a workplace incident. Construing Mr. Lew's death as a homicide is clearly the opinion of the Chief Medical Examiner, and ascribes liability of his death. Such a statement of liability for Mr. Lew's death falls squarely within the statutory exception; under the prevailing case law, the correct remedy is redaction.

Massachusetts General Laws, c. 46, § 19, provides a specific hearsay exception for death certificates: they will be admitted as "prima facie evidence of the facts recorded" [emphasis supplied]. The sole exception to this general rule of admissibility is that any reference "**to the question of liability for causing the death**" is to be excluded. Id. [emphasis supplied]. The

case law decided under this statute clearly demonstrates that the cause of Mr. Lew's death (acute pulmonary thromboembolism) is admissible, but the manner of his death (i.e. homicide) is not.

In Com. v. Lannon, 364 Mass. 480, 482, 306 N.E.2d 248, 249 (1974), the SJC considered a similar issue in a criminal case. The defendant sought to omit from evidence the Medical Examiner's report and words on the death certificate that the decedent's death was "a result of gunshot wound of chest, homicide." Id at 249. The death certificate was also admitted, over objection, a portion of which "contained the printed words, 'Accident, suicide, or homicide (specify),' and a line on which was written Dr. Curtis's response, 'Homicide.' Id. The SJC opined that the best course of action by the trial judge "would have been to exclude the term [homicide] from evidence when it was originally offered." Id. at 249.

Additionally, in both Krantz v. John Hancock Mut. Life Ins. Co., 335 Mass. 703, 141 N.E.2d 719 (1957) and Noseworthy v. Allstate Life Ins. Co., 40 Mass. App. Ct. 924, 925, 664 N.E.2d 470, 471 (1996), statements as to the manner of death were admitted, but only because there "was no dispute over liability for causing death." Noseworthy, at 471. Both cases involved known and undisputed suicides in workman's compensation cases. The issue before the jury in both cases was "not whether an insured is liable for causing death, but rather whether the company is liable under the policy given the manner of the insured's death then the opinion contained in the certificate is admissible." Id.

Here, the exact opposite is the case. The underlying manner of Mr. Lew's death is exactly what is at issue, and indeed ascribing liability for the death is the issue that the jury must ultimately decide. Following the Noseworthy court's logic, the manner of the death must be redacted.

There is no argument that the cause of Mr. Lew's death as determined by the Chief Medical Examiner, nor that it should be admitted. "A practical construction of the statute requires that a record which relates directly and mainly to the treatment and medical history of the patient, should be admitted, even though incidentally the facts recorded may have some bearing on the question of liability. A similar rule of construction governs the admissibility of entries in death certificates. Where the words have reference to the injuries of the deceased, they are admissible, even though incidentally they may have some bearing on the question of liability. Wadsworth v. Bos. Gas Co., 352 Mass. 86, 92–93, 223 N.E.2d 807, 812 (1967), *emphasis supplied, internal citations omitted.*

The death certificate lists, at Section 29, PART I, the following as the "Cause of Death:" (a) acute pulmonary thromboembolism following (b) cessation of anticoagulation therapy (c) for treatment of chronic atrial fibrillation following (d) neurosurgery to remove traumatic acute subdural hematoma." These statements relate directly to the treatment and medical history of Mr. Lew, and thus should be admitted under both c. 46, § 19 and Wadsworth.

The following sections, however, speak directly to the liability for Mr. Lew's death and should be stricken under the § 19 exception. In sections 34-35f, the Medical Examiner opines that Mr. Lew's death was a "Homicide," stemming from a workplace injury occurring 3/24/11, eleven days before the alleged negligence in this action. Almost identical language appears in the autopsy report.

The manner of Mr. Lew's death as expressed by the Medical Examiner is a matter of opinion, not of fact, and ascribes liability for Mr. Lew's death. It falls squarely within the § 19 exception and should be precluded. Just as the Lannon court advised that the best course of action of trial would have been to exclude the word "Homicide" from the death certificate and

the autopsy, likewise this Court should strike the same language, and any such language ascribing liability for Mr. Lew's death, from the death certificate, autopsy report, and any other medical record to be set before the jury.

WHEREFORE, the plaintiff now moves *in limine* that this Honorable Court exclude the uncertified, purported death certificate attestation from evidence.

Respectfully submitted,
The plaintiff,
By his attorneys,

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